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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-486

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VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC., a corporation, *Petitioner*

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY, *Respondent*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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## REPLY BRIEF

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November 1, 1973

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Virgin Islands Hotel Association (U.S.), Inc., a corporation,

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# REPLY BRIEF

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## I. New and Erroneous Allegations of Fact Underlie Arguments Presented in Brief for Respondent in Opposition Regarding the Authority's Hearing Procedure. They unfairly impute Waiver to Petitioner.

1. Inadequate notice. Respondent states (Br., p. 15) that Petitioner

"chose to ignore the notice and

> [thus] failed to engage expert assistance until almost the eve of the hearings." (Emphasis added)

There is no evidence whatsoever that Petitioner ignored the hearing notice. On the contrary, Petitioner watched the Authority's announcements and releases closely to determine whether there was need to incur the expense of hiring a rate expert.

The Authority's July 5th release, stating that there would be additional hearings, said "no new studies" were required by the court of appeals' June 28th decision. On August 8th, however, the Authority released the updated Jackson & Moreland report and the Beck rate and operations "review" report.

The latter was new; it was a post facto attempt to justify the increased rates as "reasonable." Petitioner's Board members spent two weeks reviewing it. On August 30th, after the Petitioner had lost the third week preparing for a meeting which the Authority had misled it into believing would be for settlement discussion, Petitioner authorized the hiring of a rate expert. Allowing a reasonable time for analysis of the reports released on August 8th, Petitioner thus had approximately three weeks in which to make technical preparation for the hearings.

2. Denial of cross-examination. In defense of the Authority's substitution of written questions for cross-examination, a procedure strange to the Virgin Islands as to which the Authority had given no notice during the 2 months between the hearing announcement and first hearing, Respondent

argues (Br., p. 19) that "[t]he information before the Authority was of a highly technical nature" and Petitioner had challenged "neither the credibility nor the veracity of the Authority's experts."

Petitioner, however, did challenge the credibility and veracity of the author of the Beck report, particularly; it also objected to the Authority's failure to have its experts sworn. In this connection, it should perhaps be noted that Petitioner's counsel inquired, in advance of the hearings, as to the type of hearings contemplated by the Authority and was misled by an Authority spokesman who said they would be "evidentiary."

These and other allegations of dereliction by Petitioner are, in fact, irrelevant to this Court's action on the Petition. It was Respondent's withholding of requisite data that caused the denial of procedural due process. The procedural limitations imposed by the Authority were essential to its strategy of nondisclosure.

There is absolutely no basis for Respondent's implications of waiver by Petitioner.

II. Brief for Respondent in Opposition Presents New Legal Arguments Which Are Untenable.

1. In response to Petitioner's contention of a denial of procedural due process, Respondent says (Br., p. 18) the essence of the decision below is

> "that the requirements of due process in administrative proceedings are flexible, that they pertain to substance rather than form, and that a lack of due process cannot be established without a showing of prejudice."

This is a misstatement of "the essence" of the decision below. It is an argument for procedural fluidness and formlessness in administrative proceedings consonant with administrative permissiveness, not due process of law.

Respondent seems to say, in effect, that in order to challenge unconstitutional hearing procedures, the complaining party must claim and show prejudice; that Petitioner's claims of illegal procedure are claims of prejudice, but Petitioner has failed to present proof of prejudice; and, therefore, that it has not established denial of due process. This position does not warrant comment; it suffices to unmask it.

2. In Response to Petitioner's argument that the Authority lacked adequate information on which to determine that the increased rates are "reasonable," Respondent contends (Br., pp. 7, 23) the court below held the Authority's decision to be supported by substantial evidence because it found that the engineering studies presented by the Authority "seem to provide" (emphasis added) the required information. From this, Respondent deduces that the information presented by the Authority's experts was adequate for a valid rate determination.

However, the equivocal remark of the court of appeals on which Respondent relies is not a holding that the Authority's conclusion was supported by substantial evidence. The real fallacy of Respondent's position is to be found in its statement (Br., p. 7) that the said remark

> "is unassailable on the basis of the record before this Court. This is particularly apparent in light of the fact that,

> while it had every opportunity to do so, the Petitioner neglected ... in any manner, to demonstrate that the studies performed by and for the Authority were inadequate. Since there was nothing in the record to the contrary, the Authority, and subsequently the District Court and U.S. Court of Appeals for the Third Circuit, were compelled to the conclusion that the rate increase was necessary, justified and fully supported by the hearing record." (Emphasis added)

3. Respondent also erroneously argues that Petitioner asserted that the Authority's increased rates "will constitute 'unconstitutional takings of propperty'" (Br., p. 24). The question whether or not the increased rates are confiscatory is a substantive issue which was introduced by the court below; it was not raised by Petitioner. Petitioner considers the question premature because of the incomplete state of the record.

For these further reasons, Petitioner urges, the decision below should be reviewed and reversed.

Respectfully submitted,

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